

BUMIPUTRA COMMERCE BANK BHD

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v.

**AMANAH RAYA BHD; SIVALOGANATHAN KANAGASABAI
(INTERVENER)**

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HIGH COURT MALAYA, SEREMBAN
ABDUL ALIM ABDULLAH J
[ORIGINATING SUMMONS NO: 24-1151-01]
1 OCTOBER 2009

CIVIL PROCEDURE: *Parties - Intervention - Application to intervene in proceedings to set aside order for sale - Whether legitimate and appropriate - Rules of the High Court 1980, O. 83 - National Land Code, s. 259(3)*

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The proposed intervener Sivaloganathan Kanagasabai ('Sivaloganathan') had applied to intervene and be cited as a co-defendant in this action. His application was allowed by this court. The plaintiff, however, appealed against that decision. The plaintiff had filed an originating summons in the Seremban High Court ('OS-Seremban') for an order for sale to be entered against Amanah Raya and which was so granted (without opposition) on 29 July 2002. Hence, this application in OS-Seremban by Sivaloganathan to intervene in the proceedings and be made a co-defendant. At the outset, Sivaloganathan (the applicant herein) was an executor of the estate of Ana Runa Lana a/p Palaniappa Chettiar ("Ana Runa Lana deceased") and who had been granted probate on 17 October 1997 *vide* Kuala Lumpur High Court. It was worthy to note that when the plaintiff obtained the order for sale by filing an action naming Amanah Raya as the representative of the estate, there already was in existence a duly appointed executor (Sivaloganathan) of the deceased's estate.

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Held (allowing the application):

- (1) The test for the grant or refusal of leave to intervene was whether a person's "legal interest" and not merely his commercial interest, would be affected. Intervention should be allowed where the proprietary or pecuniary rights of the intervener were directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly. (*Arab Malaysia Merchant Bank Berhad v. Jamaludin Mohd Farjis*) (paras 9 & 10)

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- A (2) Noting the decision in *Kandiah Peter v. Public Bank Bhd*, that
an order for sale is one that has not been obtained in a
proceeding resulting or terminating in a final judgment or
decree, it would therefore appear that the application for
intervention by the applicant (Sivaloganathan) in the action
B before this court was appropriate or even, legitimate. A *fortiori*,
it was discovered from the court file that the order for sale
had not culminated in any successful auction, and there had
never been any issuance of a Certificate of Sale in Form 16F
thereat under s. 259(3) National Land Code, that being a final
C step in a proceeding pursuant to an order for sale under
O. 83 Rules of the High Court 1980. (para 13)
- (3) Justice must lie where the remedy is, that is, the proper and
rightful party in the proceedings commenced by the plaintiff
D should have the executor of the estate of Ana Runa Lana
deceased, and he was the applicant (Sivaloganathan) in the
intervener application herein. The applicant was not to file a
fresh action to set aside the order as the proceedings had not
yet culminated in a successful auction. The most appropriate
E action by Sivaloganathan (the duly appointed executor of the
estate of Ana Runa Lana deceased) was to intervene and
proceed to set aside the order for sale. (para 14)

[Court to hear setting aside application after all due compliance of all
relevant matters under O. 15 r. 8 Rules of the High Court 1980.]

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Case(s) referred to:

Ang Tan Cheong v. Lim Yeoh Beng (Public Bank, Intervenor) [2002] 6 MLJ
198 (**refd**)

Arab Malaysia Merchant Bank Berhad v. Dr Jamaludin Mohd Farjis [1991]
2 CLJ 862; [1991] 1 CLJ (Rep) 19 SC (**refd**)

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EON Bank Berhad v. Pung Chong Thai [2001] 5 CLJ 469 HC (**refd**)

Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals [2008] 2 CLJ
121 FC (**dist**)

Kandiah Peter Kandiah v. Public Bank Bhd [1993] 4 CLJ 332 SC (**refd**)

*Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Berhad &
Anor* [1994] 4 CLJ 141 HC (**refd**)

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Pegang Mining Co Ltd v. Choong Sam & Ors [1968] 1 LNS 96 PC (**refd**)

Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd [1992] 2 CLJ 1153; [1992]
1 CLJ (Rep) 344 SC (**refd**)

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Legislation referred to:

National Land Code 1965, s. 259(3)

Probate and Administration Act 1959, s. 5

Rules of the High Court 1980, O. 15 rr. 6(2)(b), 8, O. 83

*For the plaintiff - Anis Hashim; M/s Shearn Delamore & Co**For the proposed intervenor - Dato' Vijay Kumar Natarajan; M/s Kumar Jaspal Quah & Aishah**Reported by Suhainah Wahiduddin***JUDGMENT****Abdul Alim Abdullah J:**

[1] The proposed intervenor Sivaloganathan a/l Kanagasabai ("Sivaloganathan") had applied to intervene and be cited as a co-defendant in this action. His application was allowed by this court *vide* its order dated 29 June 2009. The plaintiff appeals against that decision.

[2] This application bears reference to an action earlier filed by the plaintiff in Kuala Lumpur High Court *vide* Originating Summons No. S3-21-79-00 ("OS-KL") against Sivaloganathan, Arikrishna a/l Vadivelu and Amanah Raya as representatives of the estate of Ana Runa Lana a/p Palaniappa Chettiar ("Ana Runa Lana deceased").

[3] Sivaloganathan applied to set aside the OS-KL but that was disallowed, so was his Notice of Appeal. In the same, the Kuala Lumpur High Court also allowed the plaintiff to discontinue the action against Sivaloganathan and Arikrishna a/l Vadivelu, thus only leaving and naming Amanah Raya as the sole representative of the estate of Ana Runa Lana deceased. That order was made on 15 February 2001. With that in place, the plaintiff then proceeded to file this Seremban High Court Originating Summons No. 24-1151-01 ("OS-Seremban") for an order for sale be entered against Amanah Raya and which was so granted (without opposition) on 29 July 2002. Hence this application in OS-Seremban by Sivaloganathan to intervene in the proceedings and be made a co-defendant and which was allowed by me.

A [4] It is deserving to note at the outset that Sivaloganathan (the
applicant herein) is an executor of the estate of Anna Runa Lana
deceased and who had been granted probate on 17 October 1997
vide Kuala Lumpur High Court Probate No. S1-32-299-97.
B Additionally too it is worthy to note that when the plaintiff obtained
the order for sale by filing an action naming Amanah Raya as the
representatives of the estate, there already was in existence a duly
appointed executor (Sivaloganathan) of the deceased's estate.

C [5] In the circumstances of the events that had taken place
above, it manifestly appears that the appointment of Amanah Raya
seemed then to have contravened s. 5 of the Probate and
Administration Act 1959 which provides that no person can act
as executor until the grant is recalled or revoked. The underlying
reasons on the part of the plaintiff in its appointment of Amanah
D Raya in the OS-KL is best left to itself.

[6] In granting the intervention application this court is guided
by O. 15 r. 6(2)(b), Rules of the High Court 1980. It is
reproduced here:

E 6 Misjoinder and non-joinder of parties (O. 15 r. 6)

(2) At any stage of the proceedings in any cause or matter the
Court may on such terms as it thinks just and either of its
own motion or on application:

F (b) order any of the following persons to be added as a
party, namely:

G (i) any person who ought to have been joined as a party
or whose presence before the Court is necessary to
ensure that all matters in dispute in the cause or
matter may be effectually and completely determined
and adjudicated upon, or

H (ii) any person between whom and any party to the cause
or matter there may exist a question or issue arising
out of or relating to or connected with any relief or
remedy claimed in the cause or matter which in the
opinion of the Court it would be just and convenient
to determine as between him and that party as well as
between the parties to the cause or matter;

I but no person shall be added as a plaintiff without his
consent signified in writing or in such other manner as may
be authorized.

[7] Undoubtedly, a long line of authorities has illustrated the discretionary power of a court in granting an order of intervention. A few will be set out herein where relevant to the issues between the parties. A

[8] The Privy Council in *Pegang Mining Co Ltd v. Choong Sam & Ors* [1968] 1 LNS 96 demonstrates the wide powers of the court. Lord Diplock had this to say: B

The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases. C D

[9] The test for the grant or refusal of leave to intervene is whether a person's "legal interest", and not merely his commercial interest, would be affected. The question is: will a person's rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by an order which may be made in the action? (see *Pegang Mining Co Ltd v. Choong Sam & Ors*, *supra* and *Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd* [1992] 2 CLJ 1153; [1992] 1 CLJ (Rep) 344 - Supreme Court). E F

[10] In another Supreme Court decision of *Arab Malaysia Merchant Bank Berhad v. Dr Jamaludin Mohd Farjis* [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19, Gunn Chit Tuan SCJ (later CJM) held that intervention is allowed where the proprietary or pecuniary rights of the intervener are directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment either directly or indirectly. G

[11] The court has also been beneficent in allowing an applicant who has an interest in the subject matter the right to intervene even after final judgment has been entered (see *EON Bank Berhad v. Pung Chong Thai* [2001] 5 CLJ 469; *Ang Tan Cheong v. Lim Yeoh Beng (Public Bank, Intervenor)* [2002] 6 MLJ 198). H

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- A [12] This court is alerted to a statement in the law that an application for an order for sale in foreclosure proceedings does not commence an action. That action merely enforces the applicant's rights as chargee by exercising his statutory remedy against the chargor in default. The order for sale obtained is not
- B one which has been obtained in a proceeding resulting or terminating in a final judgment or decree (see *Kandiah Peter Kandiah v. Public Bank Bhd* [1993] 4 CLJ 332, Supreme Court, followed in *Kluang Wood Products Sdn Bhd & Anor v. Hong Leong Finance Berhad & Anor* [1994] 4 CLJ 141).
- C [13] In the authority relied upon by counsel for the plaintiff *Hong Leong Bank Bhd v. Staghorn Sdn Bhd & Other Appeals* [2008] 2 CLJ 121 the Federal Court decided that the application to intervene may be made at any stage of the proceedings, meaning before
- D judgment, otherwise the proceedings have concluded and there is no longer any proceedings to intervene in. Noting the decision in *Kandiah Peter, supra*, that an order for sale is one that has not been obtained in a proceeding resulting or terminating in a final judgment or decree, it would therefore appear that the application
- E for intervention by the applicant (Sivaloganathan) in the action before this court is appropriate or even, legitimate. *A fortiori*, it has been discovered from the court file that the order for sale had not culminated in any successful auction (the previous ones having been aborted) and there had never been any issuance of a
- F Certificate of Sale in Form 16F thereat under s. 259(3), National Land Code 1965, that being a final step in a proceeding pursuant to an order for sale under O. 83, Rules of the High Court 1980. The authority of *Hong Leong Bank, supra*, which was most heavily
- G relied upon by counsel for the plaintiff is clearly distinguishable on the facts. In that case the judgment had led to the order for sale and the land was sold by public auction to one Wong bin Chew to whom a certificate of sale was issued, at which stage the order was then perfected.
- H [14] As a final observation, and it is this - justice must lie where the remedy is, that is, the proper and rightful party in the proceedings commenced by the plaintiff should have been the executor of the estate of Ana Runa Lana deceased, and he is the applicant (Sivaloganathan) in the intervener application herein. The
- I applicant is not to file a fresh action to set aside the order as the proceedings had not yet culminated in a successful auction. As the

authorities speak, the most appropriate action by Sivaloganathan (the duly appointed executor of the estate of Ana Runa Lana deceased) is to intervene and proceed to set aside the order for sale. This court notes three failed previous attempts by the plaintiff at foreclosure in the High Court Kuala Lumpur, whereafter in its final attempt, had “adjourned” to the Seremban High Court for its order.

[15] For the above reasons, this court would allow the intervention application and will hear the setting aside application after all due compliance of all relevant matters under O. 15 r. 8, Rules of the High Court 1980.

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